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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-98

JOHN DOE NO. 1,

Petitioner,

v.

BANCO FRANCÊS e BRASILEIRO S.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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IN THE

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October Term, 1975

No. 75-98

JOHN DOE No. 1,

Petitioner,

v.

BANCO FRANCÊS e BRASILEIRO S.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petition does not properly present any federal question because no federal question was raised or passed upon in the New York State courts. Furthermore, there is no federal question whatsoever meeting the jurisdictional requirements of 28 U.S.C. § 1257(3), much less a substantial federal question meeting the test of Rule 19, involved in this case.

Questions Presented

1. Should this Court take certiorari jurisdiction where no federal question was raised or passed upon in the New York State courts?

2. Does this Court have certiorari jurisdiction where none of the matters specified in 28 U.S.C. § 1257(3) is drawn in question?

Statement of the Case

This is a case involving the right of a private Brazilian bank, Banco Francês e Brasileiro S.A. ("Banco-Brasileiro"), to maintain an action in a New York court against private parties who defrauded and deceived it. Thus, the question decided by the New York Court of Appeals as set forth in its opinion is as follows (2a*):

> "The principle question before us is whether a private foreign bank may avail itself of the New York courts in an action for damages for tortious fraud and deceit and for rescission of currency exchange contracts arising from alleged violations of foreign currency exchange regulations."

The New York Court of Appeals applied state law and held that the action could properly be maintained there.

The facts may be summarized as follows: Banco-Brasileiro brought an action in the Supreme Court of the State of New York, County of New York for fraud and deceit, and conspiracy to defraud and deceive, against twenty "John Doe" defendants whose identities were and are unknown to it.** The gravamen of the complaint, a copy of which is printed in the appendix to this brief at 1b-6b, is that these defendants over a period of approximately six weeks participated in the submission of numerous false applications for travelers checks to Banco-Brasileiro in Brazil, in violation of Brazilian currency regulations which strictly limit the amount of Brazilian cruzeiros that may be exchanged into other currencies for trips outside of

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* Such references are to pages of the appendix to the petition.

** Petitioner incorrectly states (pet., p. 5) that Banco-Brasileiro alleges that petitioner is a Brazilian citizen. There is nothing in the record to support such a statement. Banco-Brasileiro does not know the identities of the defendants (2a, 2b), who may include New York citizens or residents.

Brazil. This resulted in the improper exchange by the bank of Brazilian cruzeiros into travelers checks in United States dollars totalling $1,024,000.

On the first and second causes of action Banco-Brasileiro seeks rescission and delivery by defendants to Banco-Brasileiro of United States dollars in the amount of the travelers checks in question for exchange back into Brazilian cruzeiros, and on the third cause of action Banco-Brasileiro seeks damages of $100,000 (6b).

A large amount of the fraudulently obtained travelers checks were deposited by defendant John Doe No. 1 in an account having a code name of "Alberta" at Bankers Trust Company in New York City (2a, 2b). Other such travelers checks were deposited by defendant John Doe No. 2 in an account having the code name of "Samso" at Manfra Tordella & Brookes, Inc. in New York City (2a, 2b).

Petitioner moved in the Supreme Court, New York County (i) to vacate an order of attachment which Banco-Brasileiro had obtained against the property of John Doe No. 1 and John Doe No. 2, (ii) to dismiss the complaint or to stay the action, (iii) to intervene in a pending motion of Banco-Brasileiro seeking disclosure from Bankers Trust Company of the identity of John Doe No. 1 and other information in aid of the action and the order of attachment, and (iv) to deny Banco-Brasileiro disclosure from Bankers Trust Company. No federal question was presented in that motion, a copy of which is printed in the appendix to this brief at 10b-16b. No other substantive motion was made by petitioner in the lower court.

Surprisingly, in this certiorari proceeding purportedly seeking discretionary review of "federal questions", petitioner has not seen fit to apprise the Court of the following:

1. No federal question was raised by petitioner in any of the three levels of New York courts.

2. After the New York Court of Appeals rendered its decision and issued its remittitur (19a-21a) to the lower court for proceedings in accordance with its opinion, petitioner moved in the Court of Appeals for a stay and for an order "recalling and amending the remittitur" so that it would recite federal constitutional questions which petitioner asserted in his motion had been "presented and necessarily passed upon" by that court. Indeed, in that motion, a copy of which is printed in the appendix hereto at 17b-20b, petitioner said he wanted the remittitur amended so as to allow him to "petition the United States Supreme Court for a writ of certiorari" (18b).

3. In his moving papers in the Court of Appeals John Doe No. 1 could not show that he had raised any federal constitutional questions (see affidavit of the attorney for John Doe No. 1, sworn to May 21, 1975, the relevant excerpts from which are printed in the appendix to this brief at 21b-25b). The most that the attorney for John Doe No. 1 could say was that the record had "*brought into play* two areas of constitutional law" (22b, italics added), namely, the Commerce Clause (Article I, Section 8, Clause 3 of the United States Constitution) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution (22b-25b).*

4. By order dated June 13, 1975, a copy of which is set forth in the appendix hereto at 26b-27b, the Court of Appeals denied the motion to amend the remittitur.

Thus, the Court of Appeals refused to concede that any federal question had been "brought into play" or passed upon.

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* The petition now omits any reference to the Due Process Clause but refers to the Commerce Clause and adds the Supremacy Clause (Article VI, Clause 2 of the United States Constitution). See discussion below, at pp. 6-8.

Reasons for Denying the Writ

1. The Court Should Not Exercise Certiorari Jurisdiction Where No Federal Question Was Raised or Passed Upon in Any State Court Below

The petition fails to comply with subparagraph 1(f) of Rule 23 which requires a detailed showing that any federal question was timely and properly raised so as to give the Court certiorari jurisdiction. In the words of that Rule,

> —the petition does not "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised";
>
> —it does not set forth "the method of raising them"; and
>
> —it does not include "such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised".

The reason for these omissions in the petition is, as noted above, pp. 3-4, that no federal question was ever raised in the New York courts in the case.

Subparagraph 1(f) of Rule 23 also requires a petition for certiorari to state the way the federal questions were passed upon by the state court. This requirement is also not met, again for the simple reason that no federal question was passed upon.

Petitioner tries to give the impression that federal questions were passed upon by quoting (pet., pp. 6-7) from the opinion of the *dissenting* Judge of the Court of Appeals and then concluding (p. 8):

> "Thus, the federal constitutional question of the possible conflict with or pre-emption by the Commerce Clause, the power to make foreign policy and the Bretton Woods Agreement Act was considered and rejected by the highest New York State court."

In fact, there was no discussion by the majority of the Court of Appeals or the dissenting Judge of any such possible conflict or pre-emption. The majority relied upon the Bretton Woods Agreement Act, 22 U.S.C. § 286 et seq., which authorized membership in the International Monetary Fund, 60 Stat. 1401, T.I.A.S. 1501 (1945), as a basis for its conclusion that allowing Banco-Brasileiro to maintain the action did not offend New York's public policy (6a-7a). The dissenting Judge felt that the majority was changing prior state law and expressed his view that change would "better come at the hands of the State Department and the Congress", and that a "fitting sense of judicial restraint would dictate that the courts of no single state should enunciate a change" (16a).

No federal question having been raised or passed upon in the state courts, this Court should not take certiorari jurisdiction. *Tacon* v. *Arizona*, 410 U.S. 351; *Hill* v. *California*, 401 U.S. 797; *Cardinale* v. *Louisiana*, 394 U.S. 437; *Wilson* v. *Cook*, 327 U.S. 474; *Radio Station WOW* v. *Johnson*, 326 U.S. 120; *CIO* v. *McAdory*, 325 U.S. 472; *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430; *New York ex rel. Cohn* v. *Graves*, 300 U.S. 308.

2. This Court Does Not Have Certiorari Jurisdiction Where None of the Matters Specified in 28 U.S.C. § 1257(3) is Drawn in Question

The petition attempts to manufacture federal questions where none exist. Petitioner claims that the Court of Appeals' decision conflicts with two clauses of the United

States Constitution, the Commerce Clause (Article 1, Section 8, Clause 3) and the Supremacy Clause (Article VI, Clause 2), in three respects.

First, petitioner asserts that the decision conflicts with or is pre-empted by the Bretton Woods Agreement Act, 22 U.S.C. § 286 et seq. (pet., pp. 2, 9-15). The Act provides for the establishment and regulation of the International Monetary Fund and governs certain relationships among its governmental members, but it does not purport to regulate transactions between private parties such as those found in the instant case. It neither requires an American court to provide a forum for a private tort remedy nor prohibits an American court from doing so. However, as the Court of Appeals observed, the national policy of economic cooperation with the Bretton Woods signatories is furthered by providing a state forum for suit for private parties (7a). Thus, the decision of the Court of Appeals is not pre-empted by, or in conflict with, the Bretton Woods Agreement Act.

As the basis for his second "federal question", petitioner cites the power of Congress to regulate foreign commerce and the power of the President to regulate foreign affairs (pet., pp. 2, 17-18). This basis, too, is unavailing in view of the absence of a showing that any such power to regulate has been exercised in a manner that would prohibit the New York courts from allowing this case to proceed or that the Court of Appeals' decision frustrates any established federal policy.

Similarly, petitioner's reference to a "federal common law rule" (pet., pp. 2, 15-17) as his third basis for a "federal question" has no merit. As the Court stated in *Wheeldin v. Wheeler*, 373 U.S. 647, 651:

> ". . . As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. The instances where we have created federal common law are few and restricted."

Petitioner cites cases where courts have held that no country ever takes notice of the revenue laws of another, *e.g.*, *Holman* v. *Johnson*, 98 E.R. 1120 (1775) (pet., p. 15). Each of these cases recited the rule where an arm or instrumentality of the state was involved, a fact not present here, as the Court of Appeals emphasized (2a, 6a, 7a). None of the cases discussed any federal common law rule which would prohibit New York State courts from assuming jurisdiction over a private dispute involving foreign currency regulations.

The prohibition against the enforcement of another state's foreign currency regulations is a rule of the forum, here the New York State courts. The New York courts have not applied this rule where *private* parties as opposed to governmental entities are involved (7a). *Intercontinental Hotels Corp.* v. *Golden*, 15 N.Y.2d 9 (1964); *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N.Y. 533 (1953); *Industrial Export & Import Corp.* v. *Hongkong & Shanghai Banking Corp.*, 302 N.Y. 342 (1951); *Holzer* v. *Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 478 (1938); *Loucks* v. *Standard Oil Co.*, 224 N.Y. 111 (1918).

Since no federal question is involved in this case, this Court does not have certiorari jurisdiction under 28 U.S.C. § 1257(3).

CONCLUSION

The petition should be denied.

Dated: New York, New York
August 8, 1975

Respectfully submitted,

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APPENDIX

Verified Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 12017/73

BANCO FRANCÊS e BRASILEIRO S.A.,

Plaintiff,

—against—

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta", JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES Nos. 3 THROUGH 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms and corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

Plaintiff Banco Francês e Brasileiro S.A., by its attorneys Davis Polk & Wardwell, for its complaint herein alleges on information and belief:

Verified Complaint

FIRST CAUSE OF ACTION

1. Plaintiff is a corporation organized and existing under the laws of Brazil engaged in the business of banking with its principal offices located at Rua 15 de Novembro, No. 268, São Paulo, Brazil.

2. Defendant "John Doe No. 1" is a person. The name "John Doe No. 1" is fictitious and the true name is unknown to plaintiff. Said defendant is intended to be one of the persons who participated in the fraud and deceit which are the subject of the complaint herein and who maintains an account with Bankers Trust Company, New York, New York in the name of "Alberta".

3. Defendant "John Doe No. 2" is a person, firm or corporation. The name "John Doe No. 2" is fictitious and the true name is unknown to plaintiff. Said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit which are the subject of the complaint herein and who is also known as "Samso".

4. Defendants "John Does Nos. 3 through 20" are persons, firms or corporations. The names "John Does Nos. 3 through 20" are fictitious and the true names are unknown to plaintiff. Said defendants are the persons, firms and corporations in addition to defendants "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit which are the subject of the action herein.

5. Pursuant to laws and decrees of Brazil, the Central Bank of Brazil has promulgated regulations relating to currency exchange control. Under such regulations a Brazilian citizen making a trip out of Brazil is strictly limited

to exchange Brazilian cruzeiros for United States dollars (or other foreign currencies) up to a maximum of U.S. $1,000.00 (or the equivalent in other foreign currencies) for the trip. The exchange of Brazilian cruzeiros for more than U.S. $1,000.00 (or the equivalent in other foreign currencies) for the trip constitutes a serious violation of the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil.

6. Plaintiff is duly authorized by the Central Bank of Brazil to conduct currency exchange operations for travelers of Brazilian citizenship, in accordance with the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil.

7. During the period from May, 1973 through June 14, 1973 plaintiff, among other transactions, exchanged Brazilian cruzeiros for travelers checks drawn on First National City Bank, New York, and Bank of America, San Francisco, upon applications purporting to be from 1,024 different Brazilian citizens in the total amount of U.S. $1,024,000.00 and submitted on their behalf by a person calling himself "Mr. Marcos". Schedules of such travelers checks drawn on First National City Bank, New York, and on Bank of America, San Francisco, are annexed hereto as "Exhibit 1" and "Exhibit 2", respectively.

8. The required application forms purporting to be from 1,024 different Brazilian citizens were completed in each case and submitted to plaintiff, including the applicant's name, address, passport number, identity card number, exit visa number and signature.

9. Said applications were false in one or both of the following respects:

(a) the purported addresses do not exist;

(b) the passport or identity card numbers as registered with the Brazilian Government are not the numbers of the individuals named in the applications.

10. Said applications were made to plaintiff by defendants "John Doe No. 1", "John Doe No. 2" and "John Does Nos. 3 through 20", through their agent who called himself "Mr. Marcos" acting for and on behalf of defendants, and said applications were known by defendants and their agent to be false when made and defendants knew at the time that said applications were made to plaintiff that plaintiff would rely upon the statements and representations therein contained.

11. Plaintiff relied upon the statements and representations contained in said applications, and believed the same to be true, and was thereby induced to exchange Brazilian cruzeiros for travelers checks in the amount of U.S. $1,000.00 drawn on First National City Bank, New York, or Bank of America, San Francisco for each application, or a total amount of U.S. $1,024,000.00.

12. Defendants thereby violated the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil relating to currency exchange control, and obtained said travelers checks through fraud and deceit.

13. Plaintiff elects to rescind each said exchange of Brazilian cruzeiros for travelers checks by reason of defendants' fraud and deceit as hereinbefore alleged.

14. Plaintiff has no adequate remedy at law.

SECOND CAUSE OF ACTION

15. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 12 of the complaint herein.

16. Defendants "John Doe No. 1", "John Doe No. 2" and "John Does Nos. 3 through 20", combined and conspired to violate the applicable regulations of the Central Bank of Brazil and laws and decrees of Brazil relating to currency exchange control, and to defraud and deceive plaintiff, and in pursuance of such combination and conspiracy, committed acts as hereinbefore alleged in violation of said regulations and laws and decrees of Brazil.

17. Plaintiff elects to rescind each said exchange of Brazilian cruzeiros for travelers checks by reason of defendants' unlawful combination and conspiracy to defraud and deceive as hereinbefore alleged.

18. Plaintiff has no adequate remedy at law.

THIRD CAUSE OF ACTION

19. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 12 and 16 of the complaint herein.

20. By reason of said travelers checks having been issued through the fraud and deceit, and the unlawful combination and conspiracy, of defendants in violation of the applicable regulations of the Central Bank of Brazil

and the laws and decrees of Brazil relating to currency exchange control as hereinbefore alleged, plaintiff will be subject to sanctions and penalties imposed by the Central Bank of Brazil in that United States dollars in the form of travelers checks were illegally taken out of Brazil, and plaintiff has suffered injury to its business and reputation, all to plaintiff's damage in a sum not less than $100,000.00.

WHEREFORE, plaintiff demands judgment:

1. On the first cause of action, declaring each said exchange of travelers checks to defendants rescinded and directing each defendant to deliver to plaintiff for exchange into Brazilian cruzeiros an amount in United States dollars equal to the face amount of travelers checks he received through fraud and deceit;

2. On the second cause of action, declaring each said exchange of travelers checks rescinded and directing defendants, jointly and severally, to deliver U.S. $1,024,000.00 to plaintiff for exchange into Brazilian cruzeiros;

3. On the third cause of action, that plaintiff have judgment against defendants in the sum of $100,000.00; and

4. That plaintiff have such other and further relief as to the Court seems just;

together with the costs and disbursements of this action.

DAVIS POLK & WARDWELL
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Telephone: HA 2-3400

Verified Complaint

FIRST NATIONAL CITY BANK NEW YORK

TRAVELERS CHEQUES USDLRS 500,—

No. 060-772-136 to 145
060-772-156 to 205
060-772-207 to 214
060-772-216 to 235
060-772-481 to 600
060-772-611 to 754
060-772-756 to 835
060-772-841 to 854
060-772-855 to 882
060-772-891 to 900
060-772-941 to 980
060-772-981 to 060-773-000
060-773-001 to 018
060-773-023 to 024
060-773-027 to 030
060-773-033 to 036
060-773-045 to 048
060-773-057 to 060 TOTAL USDOLLARS 290.000

TRAVELERS CHEQUES USDOLLARS 100,—

No. 421-229-501 to 421-230-000
421-230-001 to 120
421-230-201 to 270
421-250-001 to 360
421-250-401 to 570
421-250-601 to 770
421-250-801 to 960
421-250-071 to 421-251-000
421-251-001 to 010
421-251-101 to 400
421-251-431 to 450
421-251-461 to 421-252-000
421-252-001 to 020
421-252-031 to 060
421-252-071 to 090
421-252-101 to 130
421-252-141 to 150

Exhibit 1

421-252-161 to 230
421-252-711 to 720
421-252-231 to 500 TOTAL USDOLLARS 291.000

TRAVELERS CHEQUES USDOLLARS 1.000,—

No. 040-252-291 to 340 TOTAL USDOLLARS 50.000

BANK OF AMERICA—SAN FRANCISCO

TRAVELERS CHEQUES USDLRS 100,—

No. 824-595-990/999
824-596-000/289
824-596-330/579
824-596-610/909
824-671-060/069
824-677-595/894
824-678-015/164
824-678-135/234
824-678-290/479
824-678-485/824-679-004
824-679-005/084
824-679-565/824-680-004
824-680-005/164
824-680-240/369
824-680-380/539
824-680-620/919
824-680-940/979
824-680-990/999
824-681-000/089
825-573-730/929
825-574-060/109
825-574-615/624
825-574-675/744
825-574-755/764
825-574-805/814
825-574-835/864
825-574-945/954
825-574-965/994
825-575-005/024
825-575-995/004 TOTAL USDOLLARS 393.000

Exhibit 2

Verified Complaint

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

DONALD N. DIRKS, being duly sworn, says that he is an attorney-at-law and associated with the firm of Davis Polk & Wardwell, attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

The reason why this verification is made by deponent and not by the plaintiff is because the plaintiff is a foreign corporation.

The sources of deponent's information and the grounds of his belief are the reports and statements made by officers of the plaintiff.

/s/ DONALD N. DIRKS
Donald N. Dirks

(Sworn to before Allan J. Mayer on July 12, 1973.)

Motion of Defendant John Doe No. 1 by Order to Show Cause dated July 24, 1973 in Supreme Court, New York County

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York, on the 24th day of July, 1973.

Present:

GEORGE POSTEL,

Justice.

Index # 12017/73

BANCO FRANCES e BRASILEIRO S.A.,

Plaintiff,

—against—

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta", JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES Nos. 3 through 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms or corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

Motion of Defendant John Doe No. 1 by Order to Show Cause dated July 24, 1973 in Supreme Court, New York County

Upon reading and filing the annexed affidavit of Stephen Gillers, sworn to July 23, 1973 with exhibits thereto, and on all prior proceedings had herein, and sufficient reason appearing therefor,

LET Banco Frances e Brasileiro S.A. show cause before this Court, at Special Term Part I, at the County Courthouse, 60 Centre Street, New York, New York, on the 26th day of July, 1973, at 9:30 A.M., or as soon thereafter as counsel can be heard, why an Order should not be made and entered:

A. Pursuant to CPLR 6223; CPLR 3211(a) 2, 7 and 8, and CPLR 327,

(1) vacating the order of attachment entered July 6, 1973, a copy of which is annexed to the affidavit of Stephen Gillers as *Exhibit "B"*, on the ground that there is no cause of action to recover damages for fraud or deceit against "John Doe No. 1" in this State;

(2) dismissing plaintiff's verified complaint, a copy of which is annexed to the affidavit of Stephen Gillers as *Exhibit "A"*, on the ground that:

(a) as a matter of law:

(i) said complaint on its face fails to state a cause of action against "John Doe. No. 1";

(ii) this Court has no jurisdiction of the subject matter of the causes of action of said complaint in that the complaint seeks to enforce the internal revenue and currency laws of Brazil;

Motion of Defendant John Doe No. 1 by Order to Show Cause dated July 24, 1973 in Supreme Court, New York County

(iii) this Court has no jurisdiction of the person of "John Doe No. 1", and

(b) as a matter of discretion:

(i) this Court should not interfere with the internal affairs of a foreign country where no legitimate reason appears for using the Courts and process of the State of New York;

(ii) the processes of this Court are being abused to obtain disclosure which will demonstrate that plaintiff's action may not be maintained in this State but that such action, if maintained at all, may only be maintained in a foreign jurisdiction;

(iii) the processes of this Court are being abused in that the plaintiff is seeking information under CPLR 3102(c) under the guise of bringing a New York action, when it knew it has no action in the State of New York, and the information will be used for abusive and extortionate purposes to obtain a collateral advantage in private negotiations;

(iv) this action is a sham and a fraud on the Court;

(3) in the interest of substantial justice, fairness and convenience, requiring plaintiff to bring its action in another forum and permanently staying such action in this Court or dismissing it on the ground that:

(a) plaintiff and "John Doe No. 1" are non-residents of the State of New York;

(b) plaintiff is not licensed to do business in the State of New York;

Motion of Defendant John Doe No. 1 by Order to Show Cause dated July 24, 1973 in Supreme Court, New York County

(c) the causes of action as alleged in plaintiff's verified complaint arose without the State of New York;

(d) the internal revenue, currency or forfeiture laws of a foreign jurisdiction, alleged to have been violated by "John Doe No. 1", are the subject matter of this action;

(e) no wrongdoing in the State of New York, either civil or criminal, is alleged against "John Doe No. 1", and

(f) the State of New York has no nexus to either the parties or to the subject matter of plaintiff's action.

B. Pursuant to CPLR 1012 and CPLR 1013, permitting "John Doe No. 1" to intervene in the motion brought on by plaintiff, purportedly pursuant to CPLR 3102(c) and CPLR 6220, a copy of which is annexed to the affidavit of Stephen Gillers as *Exhibit "C"*, and permission having been granted, why an order should not be entered pursuant to CPLR 3103, and why this Court should not exercise its discretion under CPLR 3102(c) by granting an order:

(1) on its own initiative and, as a matter of right or by the exercise of discretion, denying or regulating the disclosure sought by plaintiff against Bankers Trust Company so as to prevent unreasonable and irreparable damage to "John Doe 1" in the manner as hereafter set forth:

(a) holding in abeyance plaintiff's motion seeking disclosure against Bankers Trust Company until such

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time as there has been a final determination of the motion of "John Doe No. 1" as set forth in Paragraphs A(1)-(3) above;

(b) denying plaintiff's motion seeking disclosure under CPLR 3102(c) on the ground that:

(i) plaintiff has already framed a verified complaint which on its face (Paragraphs 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 16 and 20) demonstrates that this Court does not have jurisdiction as a matter of law or as a matter of discretion over either "John Doe No. 1" or the subject matter of plaintiff's action, and the disclosure sought could not be used in the State of New York for any legitimate purpose but could be used extralegally against "John Doe No. 1" elsewhere;

(ii) the enabling statute [CPLR 3102(c)] does not permit disclosure in aid of an action where a complaint has already been framed and served upon a garnishee in aid of attachment;

(c) denying plaintiff's motion seeking disclosure against Bankers Trust Company under CPLR 6220 on the ground that:

(i) plaintiff has previously levied against the property of "John Doe No. 1" at Bankers Trust Company and, pursuant to CPLR 6219, Bankers Trust Company, as garnishee, served upon the Sheriff of the County of New York a statement specifying that Bankers Trust Company did not have any property in its possession or custody in which "John Doe No. 1" had an interest, thus making plaintiff's motion under CPLR

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6220 unnecessary as directed against Bankers Trust Company since Bankers Trust Company has no property in which "John Doe No. 1" has an interest, and Bankers Trust Company owes no debt to "John Doe No. 1";

(ii) the enabling statute (CPLR 6220) may not be used as a device to obtain information of property of "John Doe No. 1" situated elsewhere where plaintiff already knows that Bankers Trust Company has no property of "John Doe No. 1" in its possession or custody;

(iii) the enabling statute (CPLR 6220) may not be used as a disclosure device to obtain the "identities and residences" of "John Doe No. 1" (plaintiff's order to show cause, Paragraphs A(i) and B(i); the "authorized signatories" to the accounts of "John Doe No. 1" (plaintiff's order to show cause, Paragraph A(ii); "*all* records of the accounts" of "John Doe No. 1" (plaintiff's order to show cause, Paragraph A(iii); "all documents" showing or relating *in any way* to the manner in which, and sources from whom, "John Doe No. 1" obtained any of the travelers checks (plaintiff's order to show cause, Paragraphs A(iv) and B(ii); "all documents and records" concerning Account No. 31 820 001 maintained at Bankers Trust Company (plaintiff's order to show cause, Paragraph A(v); "all documents" showing or relating *in any way* to withdrawals made from any accounts which "John Doe No. 1" had an interest, or the individuals, firms or corporations to whom such withdrawals were paid (plaintiff's order to show cause, Paragraphs A(vi) and B(ii);

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"all documents showing or relating *in any way* to descriptions and locations of any property in which "John Doe No. 1" has an interest allowing attorneys from the offices of Davis, Polk & Wardwell, attorneys for plaintiff, to there inspect the same and to take copies or photographs of the same (plaintiff's order to show cause, Paragraphs A(vii) and B(iii);

(d) denying plaintiff's motion seeking disclosure against Bankers Trust Company on the ground that the information sought to be disclosed is of a non-statutory privileged and confidential matter with the privilege vesting in "John Doe No. 1", which privilege has not been waived;

(e) denying plaintiff's motion seeking disclosure against Bankers Trust Company on the ground that the procedure utilized by plaintiff and the purposes for which such disclosure is sought, place in jeopardy the long-standing deep-rooted policy in international banking against disclosure of alias or numbered accounts.

Sufficient cause appearing therefor, let a copy of this order, and the papers upon which said order is based, served on Davis, Polk & Wardwell, attorneys for plaintiff, at One Chase Manhattan Plaza, New York, New York, and Bankers Trust Company at 280 Park Avenue, New York, New York, on or before 5:00 P.M. on the 24th day of July, 1973, be deemed sufficient.

ENTER,

G. P.
J. S. C.

Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK

New York County Index # 12017/73

BANCO FRANCES e BRASILEIRO S.A.,

Plaintiff-Appellant,

—against—

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta",

Defendant-Respondent,

—and—

JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES Nos. 3 THROUGH 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms and corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

MARTIN E. SILFEN, ESQ.,

Respondent.

Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals

Upon reading the annexed affidavit of Martin E. Silfen, sworn to May 21, 1975, and exhibits thereto, the opinion of the Court of Appeals dated May 8, 1975, the remittitur of the Court of Appeals dated May 8, 1975, the order of attachment of the Supreme Court of the State of New York, County of New York, granted July 6, 1973, the complaint of Banco Frances e Brasileiro S.A. (hereafter "Banco Brasileiro"), and upon all the proceedings heretofore had herein,

Let Plaintiff-Appellant Banco Brasileiro, or its attorneys, show cause before this Court at a Motion Term thereof, to be held in the Court of Appeals Hall, Albany, New York, on the 2nd day of June, 1975, at 2:00 o'clock in the afternoon thereof, or as soon thereafter as counsel can be heard, why an order should not issue as follows:

(i) pursuant to CPLR 5519(c), staying all proceedings to enforce the order or judgment entered on the remittitur of the Court of Appeals thereby suspending the effect of the order of attachment granted July 6, 1973, and staying any proceeding to enforce the same, pending:

(a) the hearing and determination of the motion of John Doe No. 1 (hereafter "Doe") to this Court recalling and amending the remittitur heretofore filed herein with the Clerk of the County of New York on the 15th day of May, 1975 so as to recite the constitutional questions presented and necessarily passed upon by this Court in rendering its opinions, so as to allow Doe to petition the United States Supreme Court for a writ of certiorari;

Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals

(b) the filing and disposition of Doe's petition for a writ of certiorari to the Supreme Court of the United States based on the existence of substantial federal questions;

(c) the hearing and determination of Doe's appeal to the Supreme Court of the United States;

(d) the determination by the Supreme Court of the United States in *Bert Randolph Sugar* and *Wrestling Revue, Inc.* v. *Curtis Circulation Company, et al*, Supreme Court Docket # 74-859;

(e) upon the affirmance by the *Sugar* Court, Doe's application to Special Term, New York County, or to this Court for a vacatur of the order of attachment on the ground that such order was unconstitutionally granted, i.e. CPLR 6201(8).

(ii) granting such other and different relief as may be just and proper.

SUFFICIENT CAUSE THEREFOR APPEARING, it is hereby

ORDERED that, pending the hearing and determination of this application and the entry of an order thereon, all proceedings on the opinion of this Court and on any order or judgment to be entered on the remittitur be, and the same hereby are stayed; nothing herein contained shall in any way affect the attachment presently existing in connection with this action nor shall any action be taken in connection therewith denying the course of this stay; and it is further

Motion of Defendant John Doe No. 1 by Order to Show Cause dated May 21, 1975 in New York Court of Appeals

ORDERED that service by hand of a copy of this order and of the supporting papers upon Davis Polk & Wardwell, as attorneys for Banco Brasileiro, and upon the attorneys for Bankers Trust Company and the Sheriff of the City of New York, on or before 2 o'clock in the afternoon of the 23rd day of May, 1975, shall be timely and sufficient, the original order to be filed, with proof of service, in the office of the Clerk of the Court at Albany by certified mail, return receipt requested.

Dated: New York, New York
May 21, 1975

SOL WACHTLER
Associate Judge of the
Court of Appeals

Excerpts from Affidavit of Martin E. Silfen, Sworn to May 21, 1975, in Support of Order to Show Cause

COURT OF APPEALS

STATE OF NEW YORK

New York County Index # 12017/73

BANCO FRANCES e BRASILEIRO S.A.,

Plaintiff-Appellant,

—against—

JOHN DOE No. 1, the name "John Doe No. 1" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons who participated in the fraud and deceit alleged in the complaint and who maintains an account with Bankers Trust Company, New York, New York, in the name of "Alberta",

Defendant-Respondent,

—and—

JOHN DOE No. 2, the name "John Doe No. 2" being fictitious and the true name being unknown to plaintiff, said defendant is intended to be one of the persons, firms or corporations who participated in the fraud and deceit alleged in the complaint and who is also known as "Samso", and JOHN DOES Nos. 3 THROUGH 20, the names "John Does Nos. 3 through 20" being fictitious and the true names being unknown to plaintiff, said defendants are intended to be the persons, firms and corporations in addition to "John Doe No. 1" and "John Doe No. 2" who participated in the fraud and deceit alleged in the complaint,

Defendants.

MARTIN E. SILFEN, ESQ.,

Respondent.

Excerpts from Affidavit of Martin E. Silfen, Sworn to May 21, 1975, in Support of Order to Show Cause

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARTIN E. SILFEN, being duly sworn, deposes and says:

* * * * *

The Remittitur Should Be Recalled And Amended So As To Specifically Recite The Constitutional Questions Raised By Doe And Necessarily Passed Upon By This Court

7. The Record before this Court brought into play two areas of constitutional law:

A. *The Commerce Clause*

(a) In the first place, Doe's contention that the Courts of the State of New York will not enforce the internal revenue, currency, tax or forfeiture laws of a foreign jurisdiction necessarily brought into play the inter-relationship between the laws of this State as enacted by the legislature and by decisions of this Court and the Commerce Clause of the United States Constitution, i.e. Article I, Sec. 8(3). Both the majority and the dissent opinions recognized this interplay, i.e. pp. 3-6 of the majority; pp. 1-6 of the dissent.

(b) The majority is quick to point out that its opinion sweeps away all existing prior conflicting law based upon the United States membership in the International Monetary Fund and its participation in the Bretton Woods Agreements Act. The majority opinion thrusts the Courts of the State of New York into the flow of international commerce. The dissent is quick to point out that the "responsibility for any change in this area lies with our Fed-

Excerpts from Affidavit of Martin E. Silfen, Sworn to May 21, 1975, in Support of Order to Show Cause

eral Government rather than with the highest court of any single state." So says the dissent—"Change, if at all . . . would better come at the hands of the State Department and the Congress, through the negotiation of international agreement or otherwise and the discharge of the constitutional responsibility of the Federal Government 'to regulate commerce with foreign nations'."

(c) The effect of the majority opinion is to carve out of the area of federal pre-emption in the field of international commerce an exception which will be applicable to the State of New York only. Having pre-empted the field of international commerce, only Congress, and not the courts of any single state, can legislate a change in the existing law of the land.

(d) Doe respectfully suggests that the importance of this issue be framed by this Court by recalling and amending the remittitur to provide by way of certified question as follows: Does Article I, Sec. 8(3) of the United States Constitution preclude a state court from reversing the firmly established rule of the conflicts of law forbidding any single state from enforcing the internal revenue, currency, tax or forfeiture laws of a foreign country?

(e) Since the majority opinion clearly recognizes that its opinion reflects a new attitude not previously established, the framed question above stated should be included in the amended remittitur so that it may be reviewed by the Supreme Court of the United States.

B. *The Due Process Clause*

(a) In the second place, subsequent to obtaining the order of attachment, Banco Brasileiro, by separate appli-

cation, sought to compel Doe's attorney to disclose Doe's true identity. Special Term ordered disclosure. The Appellate Division did not reach the question. This Court in its majority opinion placed Doe between Scylla and Charybdis.

(b) While recognizing that Special Term did not abuse its discretion in ordering disclosure, the majority opinion nevertheless recognized that "in a given situation disclosure might be inappropriate because it is inconsistent with the purpose of representation." Doe's attorney has always maintained that he was engaged to defend Doe against an inappropriate disclosure. The caveat of the majority prevents Doe from obtaining legal representation and runs counter to the due process clause of the Fourteenth Amendment which ensures a civil litigant the right to counsel. In effect, the majority says that if an attorney is specifically engaged to protect a Doe identity, the attorney need not make a disclosure which would be inconsistent with the terms of his engagement. He must, however, withdraw from the case. Under these circumstances, Doe's attorney can no longer be Doe's attorney unless he is willing to disclose the very thing which Doe engaged him not to do, i.e. disclose his true identity. Doe will never be able to obtain legal representation unless he is willing to have his identity disclosed.

(c) Such being the case, the constitutional right to counsel as guaranteed by the United States Constitution is infringed. Doe respectfully suggests that the remittitur be recalled and amended and that the following framed question be certified: Does the majority opinion of this Court violate Doe's right to counsel as guaranteed by the Fourteenth Amendment of the United States Constitution?

Excerpts from Affidavit of Martin E. Silfen, Sworn to May 21, 1975, in Support of Order to Show Cause

(d) This case presents a head-on collision between states' rights and federal supremacy. Doe intends to seek review of this Court's opinion in the United States Supreme Court. A petition for a writ of certiorari will be filed with the United States Supreme Court, 28 U.S.C. 1257 (3). The time for the filing of such petition expires on August 8, 1975, 28 U.S.C. 2101 (c). In order to maintain the status quo, a stay of the order or judgment to be entered on the remittitur as amended is required pending the filing and disposition of Doe's petition.

* * * * *

WHEREFORE, it is respectfully requested that this Court grant Doe's motion for an order, pursuant to CPLR 5519(c), and granting to Doe such other and different relief as may be just and proper.

/s/ MARTIN E. SILFEN
Martin E. Silfen

(Sworn to before Michael S. Toorock on May 21, 1975.)

Order of New York Court of Appeals dated June 13, 1975

COURT OF APPEALS

STATE OF NEW YORK

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of June A. D. 1975.

Present,

HON. CHARLES D. BREITEL,

Chief Judge, presiding.

1 Mo. No. 509

Banco Frances e Brasileiro, S.A.,

Appellant,

vs.

John Doe #1, &c.,

Respondent,

and

John Doe #2, &c., et al.,

Defendants,

and

Martin E. Silfen, Esq.,

Respondent.

A motion for a stay and to amend the remittitur in the above cause having heretofore been made upon the part

Order of New York Court of Appeals dated June 13, 1975

of respondent John Doe #1 and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as a stay is sought, be and the same hereby is marked "withdrawn", and it is

ORDERED, that the said motion, insofar as amendment of the remittitur is sought, be and the same hereby is denied.

JOSEPH W. BELLACOSA,
Clerk of the Court.